

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet Over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	CC Docket Nos. 95-20, 98-10
Computer III Further Remand Proceedings)	
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

**OPPOSITION
OF
BROADWING COMMUNICATIONS, LLC.
INTEGRA TELECOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS**

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan

SWIDLER BERLIN LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

December 29, 2005

Table of Contents

I.	THE REQUESTED RELIEF IS BEYOND THE SCOPE OF THIS PROCEEDING	1
II.	VERIZON SEEKS RELIEF FOR LEGACY TITLE II SERVICES.....	3
III.	VERIZON HAS NOT SHOWN THAT THE STAND-ALONE BROADBAND MARKET IS COMPETITIVE	4
IV.	BOCS RETAIN MARKET POWER IN THE STAND-ALONE BROADBAND ENTERPRISE MARKET	7
V.	VERIZON IGNORES THE NEED FOR SAFEGUARDS	10
VI.	CONCLUSION.....	12

Summary

Verizon's Petition seeks to expand the scope of relief established in the *Wireline Broadband Order* to encompass ATM, frame relay, Gigabit Ethernet and other "stand-alone" broadband services. The Commission has previously determined that this proceeding will only address wireline broadband transmission services when used to provide Internet access services. The Commission is bound by the Administrative Procedure Act to consider Verizon's requested relief, if at all, in proceedings where it has been more directly raised such as by Verizon's pending request in a separate proceeding for forbearance from Title II regulation for all wireline broadband services. Therefore, if for no other reason, the Petition must be denied because it requests relief that is beyond the scope of this proceeding.

Verizon's Petition should also be denied because ATM, frame relay, and Gigabit Ethernet are legacy services provided over the circuit switched network. Whatever validity the "lighter regulatory touch" approach sought here by Verizon may have when applied to truly new broadband services and network investment, it has no application to legacy network services.

In addition, Verizon's claims of competition in the broadband market are flawed. Although it has previously acknowledged that ATM, frame relay, and Gigabit Ethernet services are enterprise services, Verizon's showings of competition, though meager in any event, consist of claims about competition for services – cable modem, BPL, and wireless 3G – that are predominantly mass market services, to the extent they are actually being provided. These services are not substitutes for the reliability and very large capacity of ATM, frame relay, and Gigabit Ethernet service. Therefore, Verizon's showing of competition for cable modem, BPL, and 3G are irrelevant to the relief it seeks.

There is also an abundance of information in this and other proceedings showing that ILECs retain market power in provision of enterprise broadband services. In particular, the Commission's findings of impairment for high capacity loops and transport in the *Triennial Review Remand Order* verify that there are rarely competitive alternatives for incumbent loop and transport facilities. Accordingly, there is no basis for a conclusion that the market for stand-alone enterprise broadband transmission services for which Verizon seeks relief is sufficiently competitive to eliminate the need for Title II regulation of them.

Verizon ignores the need for continued safeguards in connection with its provision of broadband services. Although there is some competitive provision of ATM, frame relay, and Gigabit Ethernet service in some markets, competitive providers remain wholly dependent on inputs from Verizon and other ILECs to provide those services, as demonstrated by MCI and others. Assuming it otherwise had any merit, consideration of the Petition is premature until the Commission has reformed price regulation of interstate special access services and established permanent performance metrics including "grooming" requirements.

The Commission should promptly deny the Petition.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet Over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	CC Docket Nos. 95-20, 98-10
Computer III Further Remand Proceedings)	
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

Broadwing Communications, LLC, Integra Telecom, Inc., McleodUSA
Telecommunications Services, Inc., and U.S. Telepacific Corp. d/b/a Telepacific
Communications submit this opposition to the “Petition for Limited Reconsideration of Title I
Broadband Order” (“Petition”) filed by the Verizon Telephone Companies (“Verizon”). For the
reasons stated below, the Commission should deny the Petition.

I. THE REQUESTED RELIEF IS BEYOND THE SCOPE OF THIS PROCEEDING

Verizon requests that the Commission determine that ATM, frame relay, Gigabit Ethernet
service, like the transmission component of wireline broadband Internet access service, are only
subject to Title I of the Act. Even if this request were otherwise meritorious, which it is not, the
Commission may not grant the Petition because it requests relief that is beyond the scope of the
above-captioned proceedings. In the *NPRM* initiating the *Wireline Broadband Proceeding*, the
Commission sought comment on the appropriate framework to govern “wireline broadband

Internet access services.”¹ Although the Commission sought comment on whether a stand-alone broadband transmission component should be classified as a telecom service or merely telecommunications,² the Commission observed that the issue of “how Title II regulation applies to broadband service provided as telecommunications service” is the subject of a separate proceeding, the *NonDominance Proceeding*.³ The *Wireline Broadband Order* acknowledged that the scope of this proceeding does not encompass the regulatory status of stand-alone broadband services: “Consistent with the scope of the *Wireline Broadband Proceeding*, we restrict our decisions in this Order to only wireline broadband Internet access services and those wireline broadband technologies that have been utilized for such Internet access services.” (Footnote omitted)⁴ In addition, Verizon has requested the same relief as the Petition in a pending petition for forbearance.⁵ Verizon’s request should be considered in that or other pending proceedings where it might be within the scope of the initiating Notice, or not at all. Because stand-alone services are beyond the stated scope of this proceeding, the Administrative

¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, released February 15, 2002 (“*NPRM*”), para 9.

² *NPRM* para. 26.

³ *NPRM* para. 8; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2001 (“*NonDominance Proceeding*”).

⁴ *Wireline Broadband Order*, para. 11.

⁵ *Petition of the Verizon Telephone Companies For Forbearance Under 47 U.S.C. Section 160(c) from Title II and Computer Inquire Rules with Respect to Their Broadband Services*, WC Docket No. 04-440.

Procedures Act precludes any consideration of them here.⁶ Accordingly, the Commission must deny the Petition.

II. VERIZON SEEKS RELIEF FOR LEGACY TITLE II SERVICES

In the *Wireline Broadband Order*, the Commission stated that:

[P]roviders of wireline Broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition. These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. These broadband telecommunications services remain subject to current Title II requirements. (footnotes omitted)⁷

In addition to being basic transmission services subject to Title II, the Commission could also have noted that the ATM, frame relay, and Gigabit Ethernet services for which Verizon seeks regulatory relief are not new, innovative broadband services of the type that the Commission has sought to encourage through “a lighter regulatory treatment..”⁸ They are not likely to be the transmission technologies of choice for delivering the host of new consumer services and benefits over last mile connections that the Commission seeks to promote under Section 706 of the Act. Rather, ATM, frame relay, and Gigabit Ethernet services are legacy services that have been deployed on a widespread basis in the public telephone network for many

⁶ 5 U.S.C. Section 553(b).

⁷ *Wireline Broadband Order*, para. 9.

⁸ Petition at 2.

years. It is even recognized by sources relied on by Verizon that these services are declining and will be supplanted by IP-enabled services.⁹ Therefore, whatever validity Verizon's sought after "lighter regulatory touch" may have with respect to genuinely new broadband services and investment, it has no application to the services identified by the Petition.

The Commission should also recognize that Verizon fundamentally mischaracterizes the nature of the relief it seeks. It seeks deregulation, and the freedom to deny service, raise prices, and discriminate at will, in connection with legacy services riding the circuit switched network. In this connection, all of the arguments advanced by Verizon here, though invalid, are essentially the same as those it advances to obtain further deregulatory relief in provision of special access service.¹⁰ The Commission should not expand the scope of this proceeding to encompass legacy services.

III. VERIZON HAS NOT SHOWN THAT THE STAND-ALONE BROADBAND MARKET IS COMPETITIVE

Verizon has failed to make a case that the markets for ATM, frame relay, Gigabit Ethernet and other unidentified broadband services for which it seeks relief are competitive. First, Verizon relies primarily on "snapshot" "static" two and three year old information

⁹ Petition, n. 32, citing K. Burney & C. Nelson, In-State/MDR, Cash Cows say Bye-Bye: Future of Private Line Services in U.S. Businesses, 2004. See <http://instat.com/r/nrep/2003/IN030957BB.htm>. ("For years private line services have been the cash cow of data transport. But, today, with the world slow[ly] migrating to IP, the future of these circuit-switched services is in jeopardy. For the time being, private line services are still a large, high-margin business, with some miniscule growth in spending expected next year. The reality is, US businesses have no other alternatives with both the reach and robustness of private line services today. This, combined with some innovation on the part of providers, is expected to stave off the impending erosion of revenues for another year.")

¹⁰ See e.g., Verizon Comments, WC Docket 05-25, filed June 13, 2005 at 24.

concerning market share and the like that the Commission in the *Wireline Broadband Order* found insufficient to justify Title I treatment even for wireline broadband Internet access service.¹¹

Moreover, even if “static” data offered by Verizon were the type of information that the Commission chose to rely on in fashioning relief in this proceeding, it suffers from numerous defects. First, whatever utility those data had earlier, they have been invalidated by the prospective merger of Verizon and MCI. Verizon previously contended that it faces competition primarily from the major national IXC, including WorldCom (now MCI).¹² Obviously, that contention must be rescinded or substantially modified in light of its proposed and now FCC-approved merger with MCI.

Second, as pointed out by MCI in its opposition to the Verizon’s broadband forbearance petition, Verizon paints with an overly broad brush when it claims that the broadband market is intensely competitive.¹³ Similarly, the instant Petition makes no conscious attempt to separately identify and demonstrate competition in the retail, enterprise, or wholesale markets or to identify relevant geographic markets. This disregard of the appropriate methodology for assessing the scope and degree of competition precludes a finding that competition is sufficient to warrant the requested relief.

Moreover, to the extent Verizon offers non-static forward looking predictions of broadband competition, it provides information concerning competition in mass market services

¹¹ *Wireline Broadband Order*, para. 50.

¹² Reply Declaration of Dennis W. Carlton and Hal I. Sider, March 1, 2002, p. 16.

¹³ Opposition of MCI, Inc., WC 04-440, February 8, 2005. at 6.

even though it is requesting relief for services provided overwhelmingly to large enterprise customers. Thus, Verizon contends that the potential for growth in cable modem service, Wi-Fi, broadband over power line (“BPL”), and 3G wireless justify deregulation for ATM, frame relay, and Gigabit Ethernet service.¹⁴ Although it is possible that some enterprise customers may subscribe to cable modem service, Wi-Fi, BPL, or 3G wireless (to the extent these services are actually offered) they are primarily mass market services. Verizon’s expert witnesses in this proceeding stated that cable modem service is almost exclusively sold to residential or small business customers.¹⁵ On the other hand, Verizon’s expert witnesses in this proceeding have also stated that “[b]roadband services sold to larger business customers, including frame relay and ATM services, compete with each other and are in separate markets from broadband services sold to residential and small business customers.”¹⁶

To the extent they are or will be used by business customers, cable modem service, Wi-Fi, BPL, and 3G wireless are not practical substitutes for ATM, frame relay service, or Gigabit Ethernet service. Verizon’s experts describe frame relay service as “primarily used to provide connectivity between local area networks thereby creating a wide area network” and that frame relay is available at speeds up to 45 Mps.¹⁷ ATM is used to “provide integrated data service supporting data, voice and video applications” at speeds up to 155.5 Mbps.¹⁸ Cable modem,

¹⁴ Petition at 14.

¹⁵ Reply Declaration of Dennis W. Carlton and Hal I. Sider, March 1, 2002, at 16.

¹⁶ Reply Declaration of Dennis W. Carlton and Hal S. Sider, March 1, 2002, at 5.

¹⁷ *Id.* at 11.

¹⁸ *Id.*

BPL (if it is ever offered), and 3G wireless are not technically capable of serving as substitutes for the reliability and robust capability of ATM, frame relay, and Gigabit Ethernet riding over the public telephone network. Therefore, the competition that Verizon seeks to demonstrate for cable modem, Wi-Fi, and BPL are essentially irrelevant to the relief it seeks for service to enterprise customer services.

Other than brief and technically erroneous speculation that cable modem, BPL, and 3G wireless could provide competition to ATM, frame relay, and Gigabit Ethernet, the Petition provides no forward-looking information of the type that the Commission found could warrant deregulation of stand-alone broadband services. Accordingly, the Petition fails to demonstrate competition sufficient to warrant deregulation of ATM, frame relay, or Gigabit Ethernet service.

IV. BOCS RETAIN MARKET POWER IN THE STAND-ALONE BROADBAND ENTERPRISE MARKET

In addition to the fact that the Petition fails to show sufficient competition to justify the requested relief, the Petition should be denied because other evidence shows BOCs retain market power in provision of stand-alone broadband transmission services in the business market.¹⁹ In particular, the Commission's findings in the *TRO Remand Order* regarding competitive impairment in the business market are equally applicable here to support the conclusion that

¹⁹ We do not repeat arguments here that Verizon also retains market power in the residential broadband market because the services for which Verizon seeks regulatory relief in the Petition are enterprise services, as stated by Verizon's experts. See Comments of McLeodUSA Telecommunications Services, Inc., WC 04-440, filed February 8, 2005 and Comments of CloseCall America, Inc, WC 04-440 filed February 8, 2005 for a discussion of Verizon's market power in the residential broadband market.

Verizon retains market power in the broadband business market.²⁰ In that order, the Commission concluded, “the barriers to entry impeding competitive deployment of loops are substantial.”²¹ For example, the Commission found that CLECs “face substantial operational barriers to constructing their own facilities.”²² Competitors still face “steep economic barriers” to the deployment of last mile broadband facilities,²³ and these barriers “typically make duplication of such facilities uneconomic.”²⁴ It is natural then that competitors have only built their own last mile broadband facilities to a small percentage of business customers.²⁵ Facilities based CLECs, such as Time Warner Telecom, still rely on ILEC provided loop facilities at 75% of its customer locations.²⁶

In light of this evidence, it is no surprise that the Commission, in the *TRO Remand Order*, rejected ILEC requests to eliminate their obligation to provide unbundled access to high capacity loop and transport facilities.²⁷ In rejecting the RBOC claims that competitors did not need access to unbundled last mile broadband facilities, Chairman Powell explained that “the

²⁰ *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290, ¶¶ 187-194 (“*TRO Remand Order*”)

²¹ *Id.* ¶ 153.

²² *Id.* ¶ 151.

²³ *See TRO* ¶ 199.

²⁴ *TRO Remand Order* Separate Statement of Commissioner Kathleen Abernathy.

²⁵ *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at p. I-2.

²⁶ *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

²⁷ *TRO Remand Order* ¶¶ 187-194.

record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances.”²⁸

The *TRO Remand Order* also categorically rejects Verizon’s view that competition from cable companies in the business market effectively disciplines the RBOCs’ market power. The Commission explicitly held that the RBOCs provided “little evidence that cable companies are a significant presence in the enterprise loop market.”²⁹ Verizon presents no new evidence in the instant Petition. To the extent that cable companies provide service to business customers, it is in the mass market to “small and medium business ... that are near the residential network.”³⁰

And, as noted, cable modem service is not a substitute for ATM, frame relay, or Gigabit Ethernet service. In general, cable modem service is not an adequate alternative to ILEC enterprise services because it is unsuited for most business customers’ needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and security.³¹ Therefore, cable operators are unable to provide a serious alternative to serve business customers.

Similarly, the *TRO Remand Order* firmly dismisses Verizon’s vague and unsupported argument that intermodal competitors provide significant competition in the business market. Instead, the Commission determined that “the record does not indicate that other intermodal

²⁸ Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release*.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market.”³²

Apart from the Commission’s analysis and rejection in the *TRO Remand Order* of Verizon, MCI has also affirmed that Verizon possesses market power in the broadband market.³³ MCI has explained that there is no basis for a finding that “incumbent local exchange carriers are non-dominant with respect to interstate access services, such as frame relay and ATM, that are generally provided to larger business customers.”³⁴ AT&T Corp. also affirmed that Verizon has pervasive market power in provision of broadband services in the enterprise market.³⁵ The Ad Hoc Telecommunications User Group has affirmed that its members have “no competitive alternatives to ILEC services to meet their broadband business service requirements in the overwhelming majority of their service locations.”³⁶

Accordingly, the Commission should deny the Petition because Verizon retains market power in provision of broadband services to business customers.

V. VERIZON IGNORES THE NEED FOR SAFEGUARDS

Verizon also ignores the need for continued safeguards in connection with its provision of broadband services. Although there are some competitive providers of ATM, frame relay, and Gigabit services, those providers remain wholly dependent on ILEC special access and other

³² *Id.* ¶ 193 n. 508.

³³ Opposition of MCI, Inc., WC 04-440, filed February 8, 2004, at 6.

³⁴ Letter to Marlene H. Dortch from Ruth Milkman, Counsel to MCI, Inc., CC Docket No. 01-337, filed May 8, 2003.

³⁵ Reply Comments of AT&T Corp., CC Docket No. 01-337, filed April 22, 2002, at 10.

³⁶ Comments of Ad Hoc Telecommunications Users Group, CC Docket No. 01-337, filed at 14.

services as inputs to their competitive offerings. MCI has repeatedly pointed out to the Commission that “incumbent LEC interstate special access services are critical inputs to MCI’s frame relay and ATM services, and that the incumbent LECs continue to be dominant in provision of interstate special access services.”³⁷ The dependence of competitive providers of ATM and frame relay service on ILEC inputs enables Verizon to engage in a range of anticompetitive conduct including price squeezes, price discrimination, and poor provisioning. The threat of a price squeeze is very real because in some markets special access prices are higher than the ILEC’s retail prices for frame relay and ATM service.³⁸ The Commission’s open proceeding reviewing regulation of special access pricing rules shows that BOCs have been raising prices where they have been granted pricing flexibility.³⁹ Accordingly, consideration of the relief requested in the Petition, assuming it otherwise had any merit, is premature until the Commission has reformed price regulation of special access services and established permanent special access performance metrics including “grooming” requirements.⁴⁰

³⁷ Letter to Marlene H. Dortch from Ruth Milkman, Counsel to MCI, Inc., CC Docket No. 01-337, filed May 8, 2003.

³⁸ Reply Comments of AT&T Corp., CC Docket No. 01-337, filed April 22, 2002, at 13.

³⁹ See e.g. Comments of Ad Hoc Telecommunications Users Group, WC Docket 05-25, filed June 13, 2005 at 16.

⁴⁰ *Special Access Rates for Price Cap Local Exchange Carriers*, NPRM, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005); *Performance Measures and Standards for Interstate Special Access Services*, NPRM, CC Docket No. 01-321, 16 FCC Rcd 20896 (2001).

VI. CONCLUSION

For these reasons, the Commission should deny the Petition.

Respectfully submitted,

/s/ Patrick J. Donovan

Andrew D. Lipman

Russell M. Blau

Patrick J. Donovan

SWIDLER BERLIN LLP

3000 K Street, NW, Suite 300

Washington, DC 20007

Tel: (202) 424-7500

Fax: (202) 424-7647

December 29, 2005